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Appeal Nos. 86-1678, 87-1024, and 87-1182

THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

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U.S. Court of Appeals for the Federal Circuit

(Appeal No. 86-1678)

MATSUSHITA ELECTRIC INDUSTRIAL CO., ET AL., APPELLEES V. UNITED STATES,
ET AL., APPELLANTS

J. Kevin Horgan, Commercial Litigation Branch, Department of Justice, of Washington, D.C., argued for appellants. With him on the brief were *Richard K. Willard*, Assistant Attorney General and *David M. Cohen*, Director. Also on the brief was *John McInerney*, Office of the Deputy Chief Counsel for Import Administration, U.S. Department of Commerce, of counsel.

A. Paul Victor, Weil, Gotshal & Manges, of New York, New York, argued for appellees. With him on the brief were *Stuart M. Rosen*, *Philip A. Byler*, *Charles H. Bayar* and *Debra J. Pearlstein*.

Appealed from: U.S. Court of International Trade.

Judge RAO.

(Appeal No. 86-1678)

MATSUSHITA ELECTRIC INDUSTRIAL CO., ET AL., APPELLEES V. UNITED STATES,
ET AL., APPELLANTS

(Decided July 2, 1987)

Before FRIEDMAN, NEWMAN, and ARCHER, *Circuit Judges*.

FRIEDMAN, *Circuit Judge*.

This is an appeal by the government from a preliminary injunction entered on August 12, 1986, by the Court of International Trade, prohibiting the government from taking certain administrative actions relating to a "dumping" finding it made against the appellees Matsushita Electrical Industrial Company, *et al.* (Matsushita). *Matsushita Elec. Indus. Co. v. United States*, 645 F. Supp. 939 (CIT 1986). We reverse.

I

A. In 1971, the Secretary of the Treasury published T.D. 71-76, a "finding of dumping" that reported the Secretary's determination

"that an industry in the United States is being injured by reason of the importation of television receiving sets, monochrome and color, from Japan sold at less than fair value within the meaning of section 201(a) of the Antidumping Act of 1921, as amended [then 19 U.S.C. § 160(a), now § 1673]." 5 Cust. Bull. 151, 152, 36 Fed. Reg. 4597 (1971).

The administration of the Antidumping Act was transferred to the Department of Commerce (Commerce) in 1979. See Exec. Order No. 12,175, 3 C.F.R. 463 (1980). In 1980, Commerce entered into settlement agreements with the importers of color television receivers from Japan, including Matsushita, respecting their potential liability for dumping duties assessed pursuant to T.D. 71-76. See *Montgomery Ward & Co., Inc. v. Zenith Radio Corp.*, 673 F.2d 1254 (CCPA), cert. denied, 459 U.S. 943 (1982). The agreements provided for the payment of roughly \$70 million—\$12,526,000 of that by Matsushita—in settlement of all claims for duties assessed pursuant to T.D. 71-76 on television receivers imported on or before March 31, 1979.

B. Under 19 U.S.C. § 1675(a) (1984), Commerce is required to review at least annually the basis and amount of duty to be assessed under an antidumping duty order, and to publish the results of each such review in the Federal Register. The Antidumping Act provides that, after such a review, Commerce "may revoke" the antidumping duty order. 19 U.S.C. § 1675(c) (1984). Commerce's regulations authorize revocation

[w]henver the Secretary determines that sales of merchandise subject to an Antidumping Finding or Order * * * are no longer being made at less than fair value * * * and is satisfied that there is no likelihood of resumption of sales at less than fair value * * *. Ordinarily, consideration of such revocation * * * will be made only subsequent to [an administrative] review.

19 C.F.R. § 353.54(a) (1981-86) (Commerce's § 353.54 is substantively identical to the Treasury regulation that it replaced, § 153.44 (1980)).

The revocation of an antidumping duty order is presaged by the publication by Commerce of a "Notice of Tentative Determination to Revoke or Terminate." 19 C.F.R. § 353.54(e) (1981-86). "As soon as possible after publication." 19 C.F.R. § 353.54(f), but after opportunity has been provided "for interested parties to present views with respect to the tentative revocation," 19 C.F.R. § 353.54(e),

the Secretary will determine whether final revocation * * * is warranted. In cases where an application for a revocation * * * is based on the absence of sales at less than fair value with respect to the imported merchandise and the dispositive date for establishing a two-year period of no sales at less than fair value is the date of publication of the Finding or Order, the Secretary may determine that a final revocation * * * is warranted only if the firm involved provides information showing no sales at less

than fair value with respect to the subject merchandise up to the date of publication of the "Notice of Tentative Determination to Revoke or Terminate."

19 C.F.R. § 353.54(f) (1981-86). This court has held that, as the regulation says, such data must be current "up to the date of publication of the 'Notice of Tentative Determination to Revoke or Terminate.'" *Freeport Minerals Co. v. United States*, 776 F.2d 1029 (Fed. Cir. 1985).

C. Commerce published the results of its first and second administrative reviews of T.D. 71-76 (for the periods April 1 through March 31, 1979-80 and 1980-81), on June 5, 1981 and August 18, 1983, respectively. See 46 Fed. Reg. 30,163; 48 Fed. Reg. 37,506 (preliminary), 50 Fed. Reg. 24,278 (final: June 10, 1985). Commerce found no dumping by Matsushita for both periods, and published a tentative revocation of T.D. 71-76 with respect to Matsushita on August 18, 1983. 48 Fed. Reg. 37,508.

Third and fourth administrative reviews under T.D. 71-76, covering April 1 through March 31, 1981-83, were initiated on November 27, 1985. 50 Fed. Reg. 48,825. In a July 1986 affidavit in opposition to the preliminary injunction on appeal here, Commerce asserted that it "expect[ed] to complete the third and fourth reviews by December 1, 1986." Fifth and sixth administrative reviews, covering April 1, 1983 through February 28, 1985, were initiated on July 9, 1986, 51 Fed. Reg. 24,883, and Commerce "expect[ed] to complete these reviews by August 1987." The seventh administrative review, covering March 1, 1985 through February 28, 1986, was initiated on April 18, 1986, 51 Fed. Reg. 13,273, and Commerce "intend[ed] to issue final results for this review period by May 1987."

Commerce has provided no estimation of when it will issue a final decision on its tentative determination to revoke T.D. 71-76 as to Matsushita.

D. On July 18, 1986, Matsushita commenced this action in the Court of International Trade seeking preliminary and permanent equitable relief against Commerce. Matsushita sought an order requiring Commerce to (1) refrain from conducting administrative reviews of T.D. 71-76 for periods after August 18, 1983; (2) complete administrative reviews of T.D. 71-76 for periods extending from April 1, 1981 through August 18, 1983, pursuant to a schedule established by the court; (3) use "traditional" methodologies in calculating dumping margins; and (4) determine, based upon administrative reviews of periods prior to August 18, 1983, whether final revocation of T.D. 71-76 as to Matsushita is warranted. At the same time, Matsushita sought and obtained a temporary restraining order ("TRO"), which

ORDERED that, until July 23, 1986, [Commerce] be restrained from: taking any steps to conduct administrative reviews under T.D. 71-76 as to [Matsushita] for periods subsequent to August 18, 1983; taking any other actions inconsistent

with finalizing revocation as of August 18, 1983; and from altering the traditional methodology for reviews of periods up to that date and that on July 23, 1986, [Commerce] show cause why good cause does not exist for extending the restraint until August 8, 1986 * * *.

After a hearing on July 23, 1986, the Court of International Trade continued the TRO indefinitely.

On August 12, 1986, the Court of International Trade entered a preliminary injunction:

The Court preliminarily enjoins [Commerce] from conducting any administrative reviews under T.D. 71-76 as to [Matsushita] until it has made a final determination as to the final revocation of T.D. 71-76 with respect to [Matsushita]'s products covered by that order. [Matsushita has] demonstrated that they have acted promptly in supplying Commerce with all the data requested and that they have attempted to adhere to pricing formulae which would not put them within the ambit of T.D. 71-76 and which would keep them in compliance with the terms of the settlement agreement. Commerce, in that agreement, provided that it would "promptly revoke or modify T.D. 71-76 as soon as circumstances warrant such revocation or modification in accordance with procedures set forth in * * * applicable regulations * * *." Considering that Commerce has given no reason for the delay in making a final determination as to whether to revoke T.D. 71-76 as to [Matsushita]'s television sets, this Court finds that [Matsushita] would be irreparably harmed by having to comply with Commerce's demands for data and verification of those years beyond those involved in the revocation determination decision. The compilation of data and its verification requires an expenditure of effort in both human and other resources for which [Matsushita] will not be recompensed should it be found that plaintiffs have not been dumping and that T.D. 71-76 is revoked as to them.

* * * [I]t is the opinion of this Court that a prima facie case can be made out on the allegations in the complaint and the affidavits that have been filed in support of [Matsushita]'s motions. Additionally, [Commerce has] not adduced a reasonable ground for not acting on [Matsushita]'s application for revocation of the dumping order as to them * * *.

If the preliminary injunction does not issue, [Matsushita] will be required to provide a large amount of information and verify it for years beyond August 18, 1983, both irrelevant activities if T.D. 71-76 was revoked as to their merchandise. If Commerce is enjoined from including [Matsushita]'s television imports in any administrative review conducted for years *after* those required for a determination pertaining to revocation of T.D. 71-76 as to [Matsushita] and it is later determined that T.D. 71-76 should *not* be revoked as to [Matsushita], it can then determine whether [Matsushita] fall[s] within the purview of the dumping order for those years. Whereas [Matsushita] would be required to provide a large amount of information and provide

for its verification if the preliminary injunction does not issue, [Commerce is] merely being required to refrain from activity without losing any advantage if the preliminary injunction issues. The balance of hardships thus favors [Matsushita].

The public interest will also be served if the motion for the preliminary injunction is granted. The public interest is best served when a government agency expends its resources to perform its duties in a timely and expeditious manner, considering only relevant data. If it should be determined that T.D. 71-76 should be revoked as to [Matsushita] any additional review which Commerce would make as to entries subsequent to the revocation would be an unwarranted utilization of agency resources.

The Court also decides that, since there can be no change in the information available for entries of [Matsushita]'s color television sets for the periods [of the first three administrative reviews], that [sic] Commerce cannot logically request new (not "stale") information for those years. Nor can [Matsushita] logically be expected to have maintained their records for those years based on Commerce's new accounting procedures. Commerce must examine the information and verify it using accounting procedures that were agreed to during these time periods.

645 F. Supp. at 941-42.

II

The preliminary injunction issued by the Court of International Trade must be upheld if that court properly found that Matsushita had shown

(1) that it will be immediately and irreparably injured; (2) that there is a likelihood of success on the merits; (3) that the public interest would be better served by the relief requested; and (4) that the balance of hardship on all the parties favors [Matsushita].

Zenith Radio Corp. v. United States, 710 F.2d 806, 809 (Fed. Cir. 1983). Although the Court of International Trade did not discuss the issues in the usual order, it found that Matsushita had established these four criteria.

We hold that the court's finding of irreparable injury was clearly erroneous, and that the preliminary injunction therefore must be reversed. We do not address the findings of the Court of International Trade on the three other elements.

The court's finding of irreparable injury was based upon Matsushita's

having to comply with Commerce's demands for data and verification of those years beyond those involved in the revocation determination decision. The compilation of data and its verification requires an expenditure of effort in both human and other resources for which [Matsushita] will not be recompensed

should it be found that plaintiffs have not been dumping and that T.D. 71-76 is revoked as to them.

645 F. Supp. at 942.

The expenses and effort involved in the defense of litigation do not constitute "irreparable injury" that may justify a preliminary injunction. See *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 244 (1980); *Renegotiation Bd. v. Bannercraft Co.*, 415 U.S. 1, 24 (1974). Similarly, "the ordinary consequences of antidumping duty procedures do not constitute irreparable harm." *Toshiba Corp. v. United States*, 657 F. Supp. 534, 535 (CIT 1987); see also *UST, Inc. v. United States*, 21 Cust. B. & Dec. No. 12, p. 38, 42 (CIT 1987); *UST, Inc. v. United States*, 648 F. Supp. 1, 5 (CIT 1986); *Nissan Motor Corp. in U.S.A. v. United States*, 21 Cust. B. & Dec. No. 4, p. 32, 37 (CIT 1986); *Hyundai Pipe Co. v. United States Int'l Trade Comm'n*, 650 F. Supp. 174, 176-77 (CIT 1986).

The Court of International Trade did not find anything unique about the "effort in both human and other resources" that Matsushita would have to "expend" to comply with Commerce's seemingly routine requests. Cf. *Toshiba*, 657 F. Supp. at 535. As the court noted in *Hyundai*, "Commerce issues questionnaires in every case where a party requests administrative review under [19 U.S.C. § 1675]." 650 F. Supp. at 176.

Matsushita's situation is the direct result of its having participated in predatory pricing behavior in violation of the antidumping statute. Unless and until Commerce revokes the dumping finding, Matsushita is required to complete the questionnaires to facilitate Commerce's administrative reviews. As the Supreme Court admonished in a similar setting, Matsushita "must remember that those caught violating the Act must expect some fencing in." *FTC v. National Lead Co.*, 352 U.S. 419, 431 (1957).

The Court of International Trade criticized Commerce's failure to act on Matsushita's "application for revocation of the dumping order" as to it. The court did not, however, direct Commerce to complete its review of T.D. 71-76 for the period April 1, 1981 through April 18, 1983 by a specified date, as Matsushita had requested the court to do and as the court has done in other situations. See, e.g., *UST*, 648 F. Supp. at 6 ("The parties will adhere to the schedule [to complete the administrative reviews] proposed by defendant United States as modified and extended by this Court"); *Nissan*, 21 Cust. B. & Dec. No. 4 at 37 ("[A] proposed schedule for completion of the reviews * * * has been submitted in this action and the Court intends to have the ITA abide by these deadlines"); accord *American Permac, Inc. v. United States*, 642 F. Supp. 1187, 1192 (CIT 1986) ("[A] judicial action to enforce the statutory deadline * * * clearly would be available to participants in ITA review proceedings * * * by virtue of this court's [full equitable] jurisdiction under 28 U.S.C. § 1581(i)(4)"); see also *Allen v. Regan*, 607 F. Supp. 133, (CIT 1985) ("Accordingly, defendants [Treasury] are directed to complete their

investigation * * * within 90 days of judgment in this matter, and within 30 days of completion of that investigation, to provide plaintiff with a decision with regard to his license application").

Instead, the court enjoined Commerce from conducting, with respect to Matsushita, any further administrative reviews under T.D. 71-76 until it had made the final decision. It based that injunction upon a finding of irreparable injury that was clearly erroneous. The preliminary injunction cannot stand.

CONCLUSION

The preliminary injunction of the Court of International Trade is reversed.

REVERSED

(Appeal No. 87-1024)

ZENITH RADIO CORP., APPELLEE V. UNITED STATES, APPELLANT

Velta A. Melnbrensis, Assistant Director, Commercial Litigation Branch, Department of Justice, of Washington, D.C., argued for appellant. With her on the brief were *Richard K. Willard*, Assistant Attorney General and *Michael F. Hertz*, Director. Also on the brief were *Douglas A. Riggs*, General Counsel, *M. Joan Anderson*, Chief Counsel for International Trade, *Berniece A. Browne*, Senior Trial Counsel, U.S. Department of Commerce, *Selig S. Merber*, Assistant General Counsel, U.S. Department of the Treasury, *Michael T. Schmitz*, U.S. Customs Service, and *Alfonso Robles*, Attorney-Adviser U.S. Customs Service, of counsel.

Frederick L. Ikenson, of Washington, D.C., argued for appellee.

Appealed from: U.S. Court of International Trade.
Judge MALETZ.

(Appeal No. 87-1024)

ZENITH RADIO CORP., APPELLEE V. UNITED STATES, APPELLANT

(Decided July 2, 1987)

Before *FRIEDMAN*, *Circuit Judge*, *BENNETT*, *Senior Circuit Judge*, and *SMITH* *Circuit Judge*.

FRIEDMAN, *Circuit Judge*.

This, hopefully, is the last chapter in the lengthy saga of the unsuccessful attempt by the appellee, Zenith Radio Corporation (Zenith), to prevent the government from carrying out agreements settling claims for antidumping duties the government assessed

against the importers of Japanese color television sets into the United States. In connection with a preliminary injunction that Zenith obtained, the Court of International Trade required Zenith to post a \$250,000 bond. After the Court of Customs and Patent Appeals held that the Court of International Trade had no authority to enter such an injunction, the government moved in the Court of International Trade for the assessment of damages on the injunction bond. That court refused to assess damages, and the government has appealed from that ruling. We affirm.

In 1971 the Secretary of the Treasury published T.D. 71-76, a "finding of dumping" that reported the Secretary's determination "that an industry in the United States is being injured by reason of the importation of television receiving sets, monochrome and color, from Japan sold at less than fair value within the meaning of section 201(a) of the Antidumping Act of 1921, as amended [then 19 U.S.C. § 160(a), now § 1673]." 5 Cust. Bull. 151, 152, 36 Fed. Reg. 4597 (1971).

Pursuant to that finding, dumping duties were assessed from 1973 to 1979 upon importers of color television receivers from Japan. In 1980, the Secretary of Commerce (to whom the administration of the antidumping laws had been transferred) entered into agreements with those importers under which the importers agreed to pay the government \$77 million in settlement of their liability for the duties.

Zenith then filed suit in the Court of International Trade challenging the settlement agreements and seeking to invalidate them. Zenith argued that (1) the agreements were not authorized by 19 U.S.C. § 1617, which authorizes the Secretary to compromise "claim[s] arising under the customs laws," and, therefore, were *ultra vires*, and (2) the government officials who recommended and entered into the agreements acted arbitrarily, capriciously, and in bad faith. On Zenith's motion, the court entered a preliminary injunction prohibiting the government from implementing the settlement agreements. *Zenith Radio Corp. v. United States*, 505 F. Supp. 216 (CIT 1980). The court ruled that Zenith had "made out a substantial case on the merits of the second alternative cause of action alleging that Government officials * * * acted arbitrarily and in bad faith." *Id.* at 219.

The government moved to require Zenith to post a bond to indemnify the government for the loss it would suffer if the government ultimately prevailed in the suit, resulting from the delay in the government's receipt and use of the \$77 million settlement. The government sought a bond of \$11.5 million, equivalent to 15 percent interest on \$77 million for one year. Based upon "all the circumstances," the Court of International Trade required Zenith to post a bond of \$250,000 "to indemnify the defendant should it ultimately be determined that the defendant was wrongfully enjoined or restrained by

the preliminary injunction issued by this court * * *." *Zenith Radio Corp. v. United States*, 518 F. Supp. 1347, 1350 (CIT 1981).

A similar action, based on the same circumstances and arguments, was brought by the Committee to Preserve American Color Television ("COMPACT") in the United States Court of Appeals for the District of Columbia Circuit. That court entered a similar injunction against the government. The COMPACT suit was transferred to the Court of International Trade, and the District of Columbia Circuit dissolved its injunction.

The Court of International Trade granted summary judgment in favor of the government on the "ultra vires" counts in both cases. *Zenith Radio Corp. v. United States*, 509 F. Supp. 1282 (CIT 1981); *COMPACT v. United States*, 527 F. Supp. 341 (CIT 1981).

In connection with the remaining claim of bad faith, the court ordered the government to respond to Zenith's discovery requests, *Zenith Radio Corp. v. United States*, 1 CIT 59 (CIT 1980), and to file the full administrative record and certain documents not part of that record, *Zenith Radio Corp. v. United States*, 1 CIT 289 (CIT 1981). The Court of Customs and Patent appeals reversed the latter order and remanded the case to the Court of International Trade with directions to dismiss the action for lack of jurisdiction. *Montgomery Ward & Co. v. Zenith Radio Corp.*, 673 F.2d 1254 (CCPA 1982). After the Supreme Court denied certiorari, 459 U.S. 943 (1982), the Court of International Trade dissolved the preliminary injunction. *Zenith Radio Corp. v. United States*, 4 CIT 201 (CIT 1982).

The government then moved for assessment of damages against Zenith's \$250,000 bond. The Court of International Trade denied the motion. The court discussed five "equitable factors" that in its view bore upon the propriety of awarding damages. It ruled that Zenith "acted in good faith when it sought injunctive relief," that "[t]he relative resources of the parties * * * do not tip the scales strongly in favor of or against assessment of damages," that for the reasons it gave "[t]he court will not consider the factor of mitigation of damages," and that "Zenith's failure to win the underlying suit is not a significant factor in favor of assessment of damages." 643 F. Supp. at 1137-38. The court stated that the "most significant factor in Zenith's favor and the one upon which the court relies in denying assessment of damages, is"

the change in the law that took place after the preliminary injunction was issued and thus deprived Zenith of its day in court. That change was the decision by the court of appeals in *Montgomery Ward & Co. v. Zenith Radio Corp.*, 69 CCPA 96, 673 F.2d 1254, cert. denied, 459 U.S. 943 (1982). *Montgomery Ward* held that neither of the relevant statutes—28 U.S.C. §§ 1581(c) or (i)—conferred jurisdiction on Zenith's claim of bad faith in the antidumping settlement. 69 CCPA at 104-11, 673 F.2d at 1260-65. While *Montgomery Ward* did not change the law in the sense that it overruled a prior precedent, it did de-

cide a novel jurisdictional question in a manner contrary to what Zenith legitimately could have expected.

* * * * *

Because of the jurisdictional ruling in *Montgomery Ward*, Zenith will never have an opportunity to prove its allegation, which the court has found non-frivolous, that the \$77 million settlement was tainted by bad faith. Under all circumstances, however, it would be manifestly unfair to add a rule 65(c) insult to the jurisdictional injury. The \$77 million settlement has never been vindicated on the merits. Rather, this court was held to lack jurisdiction to review the merits of the settlement. If Zenith lost the opportunity to be heard on its good faith claim of governmental impropriety, it should not be required to pay damages to the government as well.

Id. at 1138.

II

In requiring the bond, the Court of International Trade acted pursuant to its rule 65(c), the pertinent language of which is identical to Rule 65(c) of the Federal Rules of Civil Procedure. It provides:

No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained * * *.

Since there are no decisions of the Court of International Trade or this court discussing the basis upon which that court is to determine whether to award damages under an injunction bond, we look to the decisions of other circuits dealing with the question under Federal Rule 65(c), as the Court of International Trade did in this case. 643 F. Supp. at 1135 n.7.

The circuits agree that the district court has some discretion whether or not to award damages on a bond accompanying a preliminary injunction if the injunction is reversed. They are not in agreement, however, over the bases and extent of that discretion. See, e.g., *Coyne-Delany Co. v. Capital Dev. Bd. of the State of Ill.*, 717 F.2d 385, 391-92 (7th Cir. 1983).

Some courts view the district court as having broad discretion to deny damages. See, e.g., *H & R Block, Inc. v. McCaslin*, 541 F.2d 1098, 1099 (5th Cir. 1976) ("The awarding of damages pursuant to an injunction bond rests in the sound discretion of the court's equity jurisdiction"); *Page Communications Eng'rs, Inc. v. Froehlike*, 475 F.2d 994, 997 (D.C. Cir. 1973) ("The court had discretion to refuse to award damages, in the interest of equity and justice"). Other courts—probably the majority—"hold * * * that a prevailing defendant is entitled to damages on the injunction bond unless there is a good reason for not requiring plaintiff to pay in the particular case." *Coyne-Delany*, 717 F.2d at 391. Apparently there is no disa-

greement, however, that if a district court refuses to award damages, its action is reviewed under the abuse-of-discretion standard. See, e.g., *Coyne-Delany*, 717 F.2d at 392; *State of Kan. ex rel. Stephan v. Adams*, 705 F.2d 1267, 1270 (10th Cir. 1983); *Page Communications*, 475 F.2d at 997.

In the present case, the decision of the Court of International Trade to deny damages on the injunction bond reflected the court's evaluation of five "equitable factors." The court deemed four of them to be of little or no significance. The "most significant factor" for the court and the one on which "the court relie[d] in denying assessment of damages," 643 F. Supp. at 1138, was the decision of the Court of Customs and Patent Appeals in *Montgomery Ward v. Zenith*, *supra*. That decision held that the Court of International Trade had no jurisdiction to entertain Zenith's suit insofar as Zenith charged that the government acted in bad faith in entering into the settlement agreements because Zenith could not "inquire into the merits of the settlement or into the Secretary's mental processes in deciding upon settlement * * *." 673 F.2d at 1264.

The Court of International Trade referred to the *Montgomery Ward* decision as a "change in the law that took place after the preliminary injunction was issued and thus deprived Zenith of its day in court." It further stated, however: "While *Montgomery Ward* did not change the law in the sense that it overruled a prior precedent, it did decide a novel jurisdictional question in a manner contrary to what Zenith legitimately could have expected." 643 F. Supp. at 1138 (footnote omitted).

The *Montgomery Ward* decision was not a "change in the law" in the sense that term has been used in other cases that upheld a district court's denial of damages resulting from a preliminary injunction. E.g., *State of Kan. ex rel. Stephan v. Adams*, 705 F.2d at 1269 (new statute); *Coyne-Delany*, 717 F.2d at 393 (intermediate-level state appellate court decision reversed by state supreme court). On the other hand, the decision did announce and apply a limitation upon the jurisdiction of the Court of International Trade that had not theretofore been stated. The result was to preclude Zenith from litigating its contention, which the Court of International Trade "found non-frivolous, that the \$77 million settlement was tainted by bad faith." 643 F. Supp. at 1138.

If we had made the initial decision whether to assess damages on the bond, we might have given the five "equitable factors" different weight than the Court of International Trade gave them. We therefore might have come out the other way. Considering all the circumstances, however, we cannot say the Court of International Trade abused its discretion in reaching the conclusion it did. Accordingly, the court's order denying the government's motion for assessment of damages on the injunction bond is affirmed.

AFFIRMED

(Appeal No. 87-1182)

MAST INDUSTRIES, INC., PLAINTIFF-APPELLANT *v.* UNITED STATES, DEFENDANT-APPELLEE

Steven P. Florsheim, Grunfeld Desiderio, Lebowitz & Silverman of New York, New York, argued for appellant. With him on the brief was *Robert B. Silverman*.

Susan Handler-Menahem, Commercial Litigation Branch, Department of Justice, of New York, argued for appellee. With her on the brief were *Richard K. Willard*, Assistant Attorney General, *David M. Cohen*, Director and *Joseph I. Liebman*, Attorney In Charge, International Trade Field Office.

Appealed from: U.S. Court of International Trade.
Judge CARMAN.

(Appeal No. 87-1182)

MAST INDUSTRIES, INC., PLAINTIFF-APPELLANT *v.* UNITED STATES, DEFENDANT-APPELLEE

(Decided June 25, 1987)

Before FRIEDMAN AND DAVIS, *Circuit Judges* and NICHOLS, *Senior Circuit Judge*.

NICHOLS, *Senior Circuit Judge*.

Mast Industries, Inc. (Mast) appeals from the judgment of the United States Court of International Trade, 652 F. Supp. 1531 (Ct. Int'l Trade 1987), affirming the decision of the United States Customs Service (Customs) that operations performed on Mast's fabric in Hong Kong did not substantially transform the fabric, originally from the People's Republic of China (P.R.C.), for purposes of determining the country of origin and the appropriate Customs treatment under 19 C.F.R. § 12.130. We affirm.

BACKGROUND

On approximately July 23, 1986, Mast attempted to enter a shipment of fabric into the United States at John F. Kennedy Airport in New York. This fabric was produced in the P.R.C. in unfinished form and then processed in Hong Kong prior to reaching the United States. Mast presented an entry visa for the goods from Hong Kong believing that was the proper country of origin. Customs disagreed, viewing the goods as products of the P.R.C., and denied entry finding that the goods lacked the proper visa.

In the P.R.C., the fabric involved in this case went through various processes that transformed it from raw cotton to unfinished fabric, known as "greige" goods. These goods were then subject to a variety of additional processes in Hong Kong. These included dyeing and not printing. The operation of these two stages is

presented in detail in Judge Carman's opinion. 652 F. Supp at 1534-35.

Both Customs and Mast presented contradictory evidence to the Court of International Trade on whether a substantial transformation of the goods occurred in Hong Kong. Mast presented evidence that the greige goods changed in commercial identity and value after the Hong Kong work was completed. There were several manufacturing steps taken in Hong Kong, and they allegedly added substantially to the money value of the goods. Customs argued the opposite, essentially that the fundamental character of the goods had not changed after the goods left the P.R.C.

Judge Carman did not reach the conflict between this testimony, noting that it was not directed at the dispositive issue of whether the case falls within the purview of 19 C.F.R. § 12.130 (e)(1) and (e)(2). The court found that dyeing and printing, as well as two other major processes, had not taken place and concluded that the regulation specifically precluded a finding of substantial transformation. The court based this conclusion on the clear meaning of the regulation, the relevant "legislative history," and the interpretation offered by Customs of its own regulation.

ANALYSIS

I

This case concerns the interpretation of the "country of origin" regulation, 19 C.F.R. § 12.130, designed by Customs to facilitate administration of the textile import program and to prevent circumvention of multilateral and bilateral textile agreements. 50 Fed. Reg. 8710-11 (1985) (codified at 19 C.F.R. § 12.130). We need not repeat Judge Carman's able review of the background to this textile regulation. Suffice it to say that the regulation was adopted in a "regulatory vacuum," where ad hoc determinations had been the rule of the day, resulting in import treatment inconsistent with the various textile agreement as they had been intended to be. The President was authorized to make regulations and Customs made them under delegated authority. 7 U.S.C. § 1854; Exec. Order No. 12,475, 3 C.F.R. 203 (1985). The old method of statutory definition, to be interpreted by judicial decision, was not working well. If the agreements were to serve their purpose, they had to be construed by persons familiar with their background, and with the trade with which they dealt.

The general provision of the regulation is as follows:

(b) *Country of origin.* * * * [A] textile or textile product, subject to section 204, Agricultural Act of 1956, as amended, imported into the customs territory of the United States, shall be a product of a particular foreign territory or country, or insular possession of the U.S., if it is wholly the growth, product, or manufacture of that foreign territory or country, or insular possession. However, * * * a textile or textile product, subject to

section 204, which consists of materials produced or derived from, or processed in, more than one foreign territory or country, or insular possession of the U.S., shall be a product of that foreign territory or country, or insular possession where it last underwent a substantial transformation. A textile or textile product will be considered to have undergone a substantial transformation if it has been transformed by means of substantial manufacturing or processing operations into a new and different article of commerce.

19 C.F.R. § 12.130(b).

The controversy in this case concerns the issue of substantial transformation and whether an importer has any grounds to escape the seemingly clear language of the regulation as it addresses printing and dyeing, which is as follows:

(e) *Manufacturing or processing operations.* (1) An article or material *usually* will be a product of a particular foreign territory or country, or insular possession of the U.S., when it has undergone prior to importation into the U.S. in that foreign territory or country, or insular possession any of the following:

(i) Dyeing of fabric *and* printing when accompanied by two or more of the following finishing operations: bleaching, shrinking, fulling, napping, decatizing, permanent stiffening, weighting, permanent embossing, or moireing;

* * * * *

Id. § 12.130(e)(1)(i) (emphasis supplied).

The complement to the above-cited portion is as follows:

(2) An article or material *usually* will not be considered to be a product of a particular foreign territory or country, or insular possession of the U.S. by virtue of merely having undergone any of the following:

* * * * *

(v) Dyeing and/or printing of fabrics or yarns.

Id. § 12.130 (e)(2)(v) (emphasis supplied).

Mast, arguing on appeal much of what it presented to the trial court, contends that the regulation is merely illustrative and, when read with the work "usually" in the two quoted sections, means that either printing or dyeing, when accompanied with other processes, may be sufficient for substantial transformation. We disagree. Although the examples provided in the regulation are not all encompassing, the regulation does address printing and dyeing. As a matter of statutory interpretation, the language itself must be given considerable weight. See *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) (statutory language must ordinarily be regarded as conclusive in the absence of clearly expressed legislative intent to the contrary). Neither the provisions of the statute nor the "legislative history" support Mast's contentions in this case.

The work "usually" should be read in conjunction with 19 C.F.R. § 12.130(d):

(d) *Criteria for determining country of origin.* The criteria in paragraphs (d) (1) and (2) of this section shall be considered in determining the country of origin of imported merchandise. These criteria are not exhaustive. One or any combination of criteria may be determinative, and additional factors may be considered.

Id.

This language suggests that the regulation is flexible and allows Customs to address circumstances not contemplated, such as where a new or unusual process is used in treating textiles. Although the language of this section addresses the *general* guidelines of 19 C.F.R. § 12.130(d), we note it does not in any way modify the examples set out in paragraph (e).

The emphasis Mast places on "usually" in the regulation implies that the general discretion available to Customs under the regulation in some way diminishes the meaning of the specific examples provided in the regulation regarding printing and dyeing and other processes. Essentially Mast argues that the requirement of printing and dyeing does not control when there are other processes applied to the fabrics not set out in 19 C.F.R. § 12.130(e)(1)(i). There is no support for this position.

The Customs service addressed the example of printing and dyeing during the rulemaking proceedings:

Customs believes it is appropriate to amplify on the dyeing or printing example in the interim regulations to provide better guidance on the type or types of operations that will result in a change in the country of origin. Three examples concerning finishing operations have been inserted in the final regulations which are more specific and convey Customs views that, in the case of fabrics, usually any finishing operations short of a combination of both dyeing and printing together with at least two other major finishing operations will not result in a substantial transformation of the fabric.

50 Fed. Reg. at 8713.

This passage provides direct support for a reading of the already clear language of the regulation as requiring both printing and dyeing. It is not inconsistent with the idea that we have here a "bright line," meant for ready application, both in the Customs house and in the Court of International Trade, without the need to reweigh disputed facts for every new customs entry. In our view Customs suggests in these comments that printing and dyeing is a threshold requirement and that discretion may be exercised in determining whether the two other finishing operations are "major."

The regulation provides, at most, discretion for Customs to deviate from the examples provided in the regulation when unusual circumstances arise. There is nothing to show the operations per-

formed on the fabric here involved were unusual circumstances. Mast provides no evidence of legislative intent, moreover, to lead this court to conclude that the regulation does not permit the interpretation adopted by Customs and upheld by the trial court, viewing the existence of printing and dyeing as determinative. Although we do not see this as a close case, to the extent that there is any degree of interpretation of the Customs regulation, an agency's interpretation of its own regulation must be given substantial weight by a reviewing court. *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945). "[T]he ultimate criterion is the administrative interpretation, which becomes controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Id.* at 414. We hold that the interpretation of 19 C.F.R. § 12.130(e)(1)(i) by Customs, and upheld by the trial court, was not erroneous.

II

As an alternative to arguments on the meaning of the regulation, Mast contends that the court should have considered the evidence Mast presented on the various processes applied to Mast's fabrics. Again, we disagree. The conclusion reached by the trial court, which we uphold, is that the question whether both printing and dyeing were done in a particular case is determinative. Since no printing was done, it was unnecessary for the court to discuss the evidence of other processing operations applied to the fabrics in this case. If the court had reached these other operations as part of its analysis, it would have implicitly disagreed with Customs' view of these regulations, which both the trial court and this court view as quite reasonable.

Mast's final and meritless contention is that the court failed to consider caselaw developed prior to the enactment of the regulation. As Judge Carman noted, the regulation in issue was adopted to provide guidance in the absence of judicial or legislative direction on the subject of "country of origin" for textile quota purposes. Mast, in prior litigation, challenged the validity of these regulations as, *inter alia*, contrary to prior case-law and did not prevail. *Mast Industries, Inc. v. Regan*, 596 F. Supp. 1567, 1567-77 (Ct. Int'l Trade 1984). As such, the valid regulation and not caselaw controls this case. This case law is considered the source of the evil the regulation was meant to correct, and thus it is something to avoid, not to seek out for guidance. One case specifically, *Cardinal Glove Co. v. United States*, 4 Ct. Int'l Trade 41 (1982), was considered a threat to the future administration of the trade agreements. 50 Fed. Reg. 8711 (1985) (codified at 19 C.F.R. § 12.130).

III

Of course, it is possible the regulation, as we interpret it, may produce operations in Hong Kong or elsewhere, combining dyeing and printing, not for any economic or functional reason, but simply

to obtain a favorable country-of-origin determination. The more familiar one is with the past history of customs administration and litigation, the less surprised one would be by such a development. It is not this case, however, and can be dealt with if it occurs. The regulation may point out a loophole through which Hong Kong could qualify as the country of origin, though only by means of a sham transaction. If Customs made a mistake in not anticipating such a development, it is not the kind of mistake the judiciary was created to correct.

As the trial court made no finding, it is also possible the combination of dyeing and printing the same fabric may be, as some testimony asserted, generally useless and therefore rare. It might have been simpler to have said mere finishing of greige goods from elsewhere will not "ever" or "usually" make the country of finishing the country of origin. This does not establish, however, that Customs meant in the regulation we have something other than what it said. It is not unheard of for a legislative or regulatory body to write in such a way as to seem to grant, but inartistically, a benefit it really means to deny. *Cf. Aparacor, Inc. v. United States*, 571 F.2d 552 (Ct. Cl. 1978). The draftsman's tongue may be planted firmly in cheek, or it may be a good faith error, but in either case, sufficient handle is not afforded to courts to read the language as meaning something other than what it plainly says. Courts do this only in rare instances, when the result of a literal reading is absurd, and contrary to actual intent as shown by legislative history or the statutory structure taken as a whole. *Ambassador Division of Florshheim Shoe v. United States*, 748 F.2d 1560, 3 Fed. Cir. (T) 28 (1984). The result here is not absurd and there is no real evidence of any intent contrary to the literal language. So far as appears, Customs could have said directly that greige goods never become a new and different product by mere finishing, and if they said so indirectly, as some testimony would seem to show, that does not justify frustrating Customs' intent.

CONCLUSION

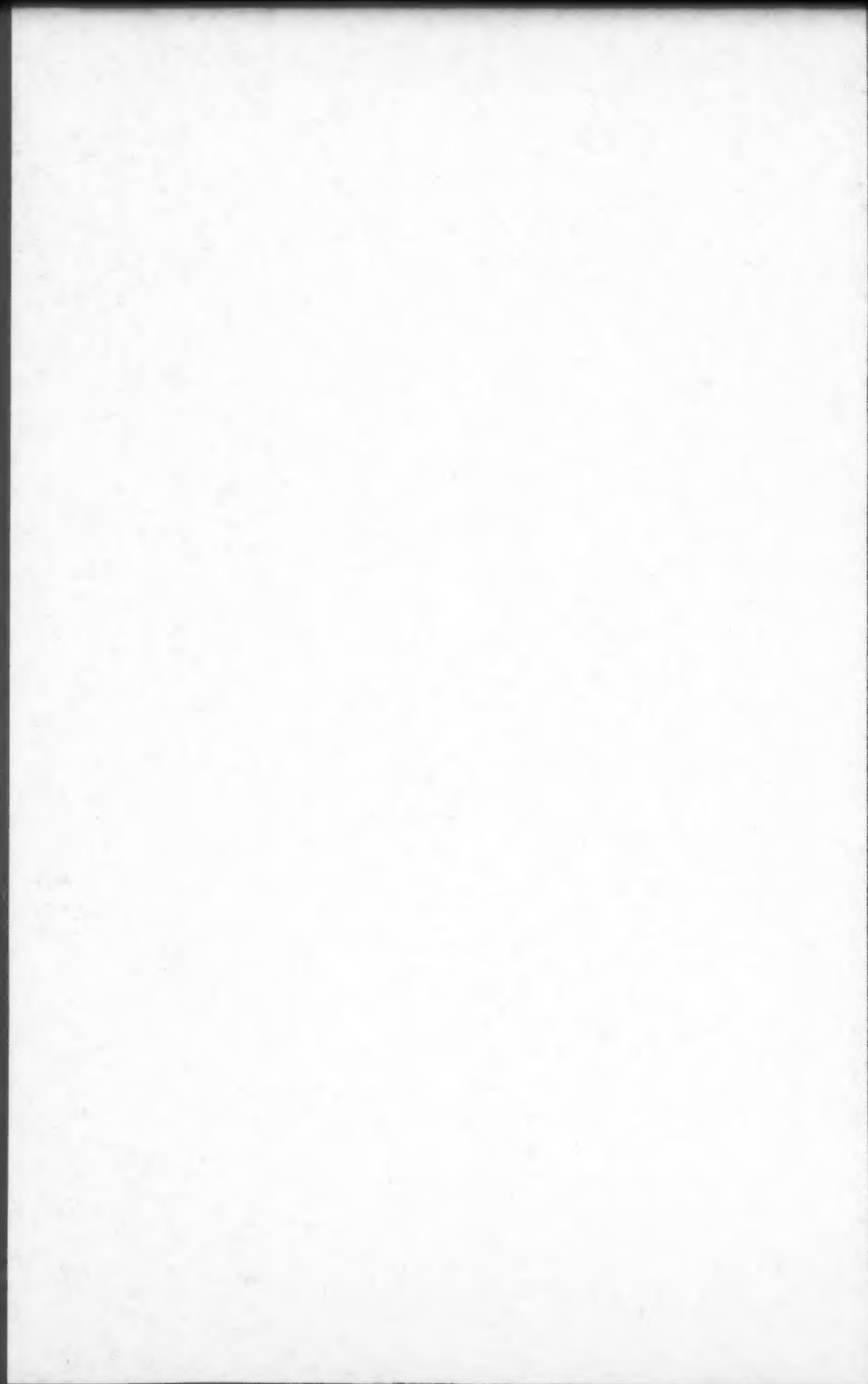
We conclude that the interpretation of 19 C.F.R. § 12.130(e)(1)(i) as requiring printing *and* dyeing is reasonable and consistent with legislative intentions. We affirm.

AFFIRMED

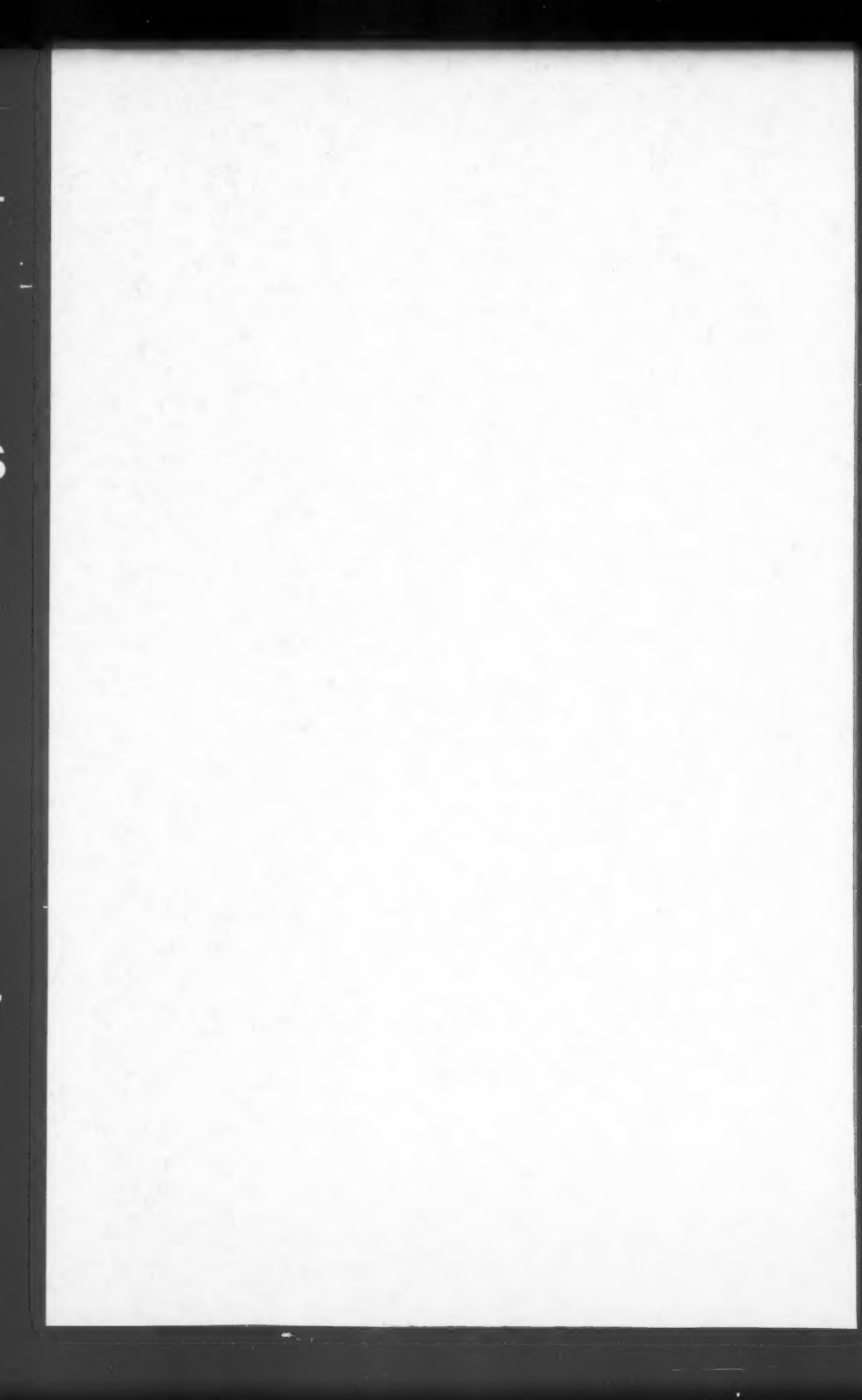




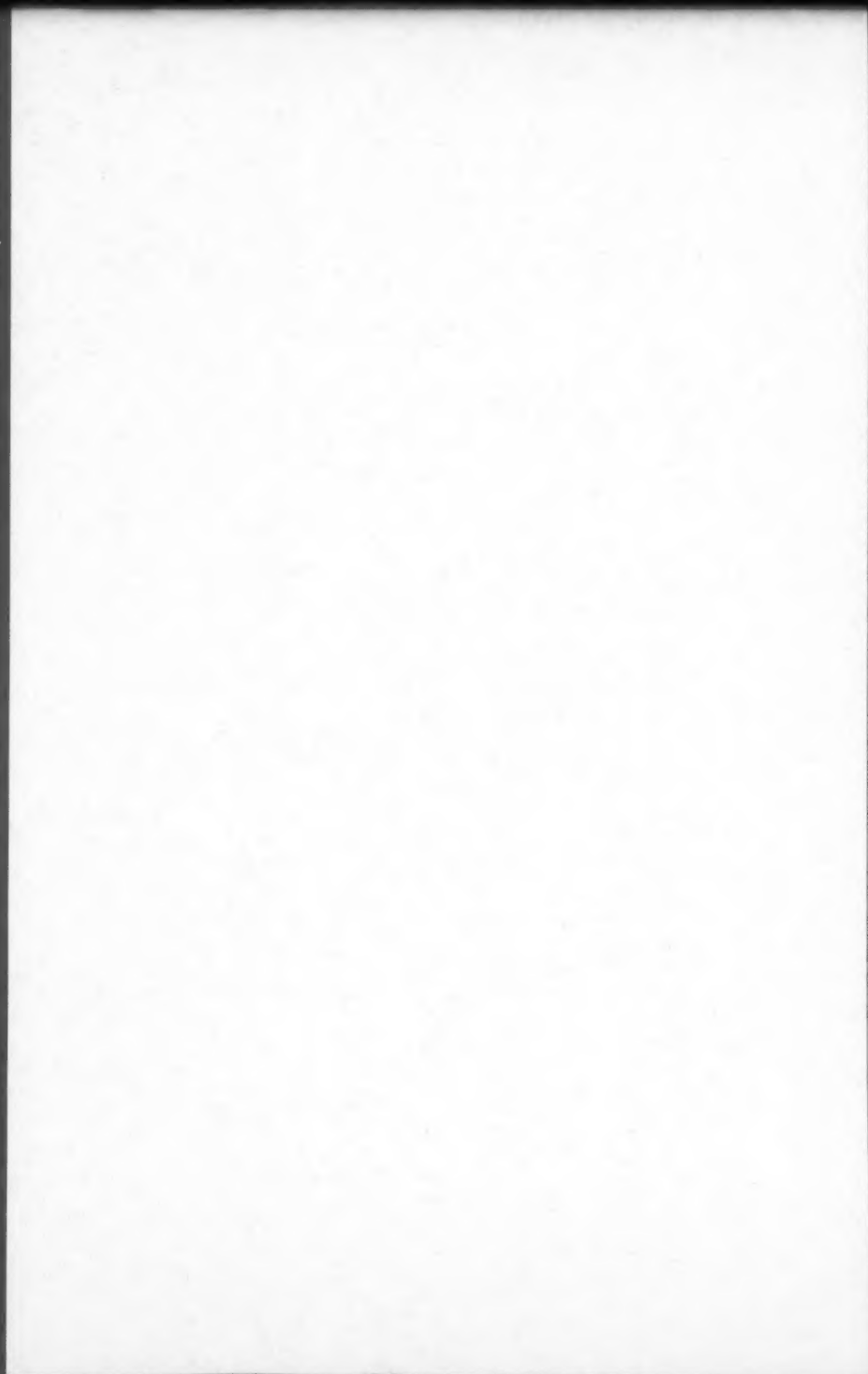




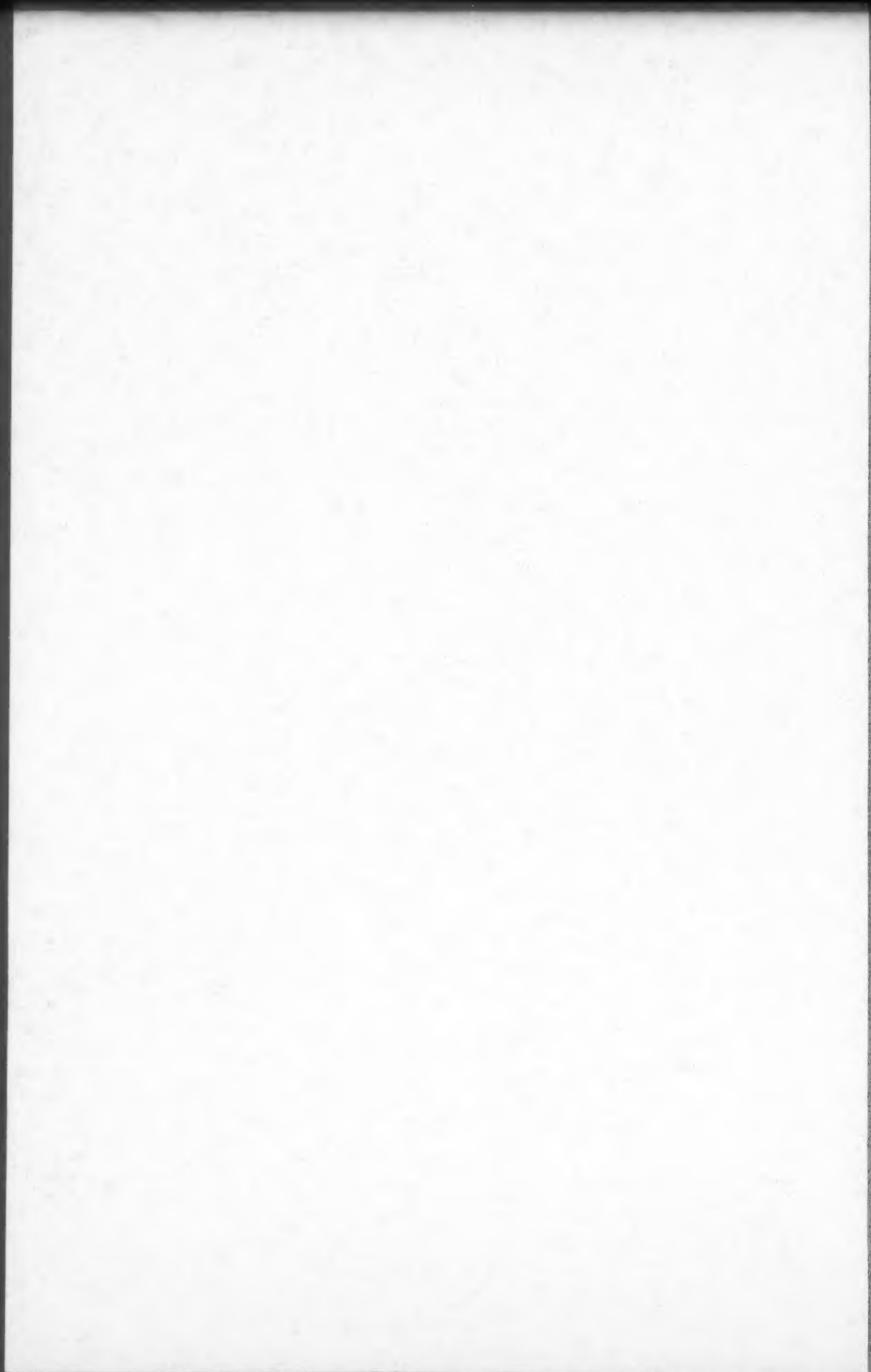












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